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In two recent cases, the Supreme Court has recognized a first amendment right of access to criminal trials.[1] Dissenting in *Globe Newspaper Co. v. Superior Court*,[2] Chief Justice Burger noted the "disturbing paradox" that states may mandate closure of juvenile delinquency proceedings to protect a seventeen-year-old accused of rape, but may not mandate closure of part of a criminal trial to protect a minor witness who has been raped or otherwise sexually abused. Proper resolution of this paradox, however, may lie not in closing the criminal courtroom, but in opening the juvenile courtroom. Juvenile court judges in most states are required or routinely permitted to exclude the general public from juvenile delinquency hearings.[3] The Supreme Court's recent recognition of the right to

1. Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

2. 102 S. Ct. at 2623 (Burger, C.J., dissenting).

3. The juvenile court statutes of 27 states provide that the general public shall be excluded from juvenile delinquency hearings, but give the court discretion to allow entry to those with a direct or proper interest in the case or in the work of the court: ALA. CODE § 12-15-65(a) (1975); ALASKA STAT. § 47.10.070 (1979); D.C. CODE ANN. § 16-2316(e) (1981); GA. CODE ANN. § 24A-1801(c) (Supp. 1982); HAWAII REV. STAT. § 571-41 (Supp. 1980); IDAHO CODE § 16-1813 (1979); ILL. ANN. STAT. ch. 37, § 701-20(6) (Smith-Hurd Supp. 1981); KY. REV. STAT. § 208A.110 (1982); LA. CODE JUV. PROC. art. 69 (West 1982); MASS. ANN. LAWS ch. 119, § 65 (Michie/Law. Co-op. Supp. 1975); MINN. STAT. ANN. § 260.155(1) (West 1982); MISS. CODE ANN. § 43-23-15 (1972); MO. REV. STAT. § 211.171(5) (1975); NEV. REV. STAT. § 62.193(1) (1981); N.H. REV. STAT. ANN. § 169:20 (1977); N.D. CENT. CODE § 27-20-24(5) (Supp. 1981); OR. REV. STAT. § 419.498(1) (1981); 42 PA. CONS. STAT. ANN. § 6336(d) (Purdon 1982); R.I. GEN. LAWS § 14-1-30 (1970); S.C. CODE ANN. § 20-7-755 (Law. Co-op. Supp. 1982); UTAH CODE ANN. § 78-3a-33 (1977); VT. STAT. ANN. tit. 33, § 651(c) (1981); VA. CODE § 16.1-302 (1982); WASH. REV. CODE § 13-34.110 (1981); W. VA. CODE § 49-5-1(d) (Supp. 1980); WIS. STAT. ANN. § 48.31(5) (West 1979); WYO. STAT. § 14-6-224(b) (1978).

The juvenile court statutes of 15 states give the court discretion to exclude the general public, or provide for open hearings unless the court finds that a closed hearing better serves the interests of the child or of justice: ARK. STAT. ANN. § 45-442 (1977); COLO. REV. STAT. § 19-1-107(2) (1978); FLA. STAT. ANN. § 39.09(1)(c) (West Supp. 1981); IND. CODE § 31-5-7-15 (1976); IOWA CODE ANN. § 232.39 (West Supp. 1981); KAN. STAT. ANN. § 38-822 (1981); MD. CTS. & JUD. PROC. CODE ANN. § 3-812(e) (1980); MICH. COMP. LAWS ANN. § 712A.17(1) (Supp. 1981); N.M. STAT. ANN. § 32-1-31(B) (Supp. 1981); N.Y. FAM. CT. ACT § 741(b) (McKinney 1975); N.C. GEN. STAT. § 7A-629 (1981); OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1982); OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1981); TENN. CODE ANN. § 37-224(d) (1977); TEX. FAM. CODE ANN. § 54.08 (Vernon 1975).

Two state juvenile court statutes require juvenile delinquency hearings for certain serious offenses to be open to the general public, and give the court discretion as to the other hearings. DEL. CODE ANN. tit. 10, § 972(a) (1975); MONT. CODE ANN. § 41-5-521(5) (1981). California provides for public access to juvenile hearings for certain serious offenses, but allows the victim to close such hearings. The general public is excluded from the remaining delinquency hearings, except that the court has discretion to admit those directly interested in the case or court. CAL. WELF. & INST. CODE § 676(a) (West Supp. 1981). Maine opens juvenile hearings for certain serious offenses, and closes the remaining delinquency hearings. ME. REV. STAT. ANN. tit. 15, § 3307(2) (Supp. 1982). South Dakota opens all of its juvenile hearings to the public, unless the child or his representative requests that the hearing be private. The court

attend criminal trials, however, casts doubt on the constitutionality of excluding the public from juvenile delinquency hearings.[4]

Despite the differences between the criminal and juvenile court systems,[5] the Supreme Court has extended many criminal procedural safeguards to juvenile delinquency hearings.[6] The Court does not, however, "automatically and preemptorily" apply every procedural safeguard to juvenile hearings; rather, it carefully examines the criminal trial standard in the context of delinquency hearings.[7] Adopting a similar approach, this Note considers the implications of a constitutional right of access to juvenile delinquency hearings.

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may then admit interested persons, court officers, and the news media. S.D. CODIFIED LAWS ANN. § 26-8-32 (1976).

The juvenile judge is not the only person who may open juvenile delinquency hearings in some states. The following statutes extend the right to a public trial to juvenile offenders: ALASKA STAT. § 47.10.070 (1979); LA. CODE JUV. PROC. art. 69 (West 1982); N.C. GEN. STAT. § 7A-629 (1981); OR. REV. STAT. § 419.498(1) (1981); VA. CODE § 16.1-302 (1982); WIS. STAT. ANN. § 48.31(5) (West 1979) (juvenile has right to a public hearing unless victim of alleged sexual assault or the juvenile's parent or guardian objects). Other statutes provide for the admission to juvenile court hearings of persons whose presence is requested by the minor, the parents or guardian, or any party: ALA. CODE § 12-15-65(a) (1975); CAL. WELF. & INST. CODE § 676(a) (West Supp. 1981); COLO. REV. STAT. § 19-1-107(2) (1978); HAWAII REV. STAT. § 571-41 (Supp. 1980); UTAH CODE ANN. § 78-3a-33 (1977); W. VA. CODE § 49-5-1(d) (Supp. 1980).

Four states have not enacted legislation that provides rules for attendance at juvenile delinquency hearings: Arizona, Connecticut, Nebraska, and New Jersey.

This survey of modern juvenile court legislation reveals that no state extends the public right of access to criminal trials to juvenile delinquency hearings.

4. This Note will discuss juvenile court adjudication hearings in which the juvenile is accused of an act that would constitute a crime if committed by an adult. This is the type of juvenile court proceeding that most closely resembles a criminal trial. It should be noted that the jurisdiction of most juvenile courts extends to many areas beyond the scope of this Note. Some examples are cases of noncriminal misbehavior by juveniles, such as truancy, running away, or incorrigibility; cases of parental neglect or abuse; and cases of adults charged with contributing to the delinquency of a minor. This Note also excludes juvenile court hearings other than those to adjudicate delinquency: detention hearings, hearings to determine a minor's fitness to be tried as an adult, and dispositional hearings. *See generally* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE: REPORT OF THE NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1980) (discussing the full range of judicial activities affecting youth in the context of recommending a comprehensive set of standards).

5. *See* notes 36-40 *infra* and accompanying text.

6. *See* Kent v. United States, 383 U.S. 541, 562 (1966) (juvenile court hearings "must measure up to the essentials of due process and fair treatment"). Since the *Kent* decision, the Court has specified some of these "essentials" in the context of delinquency adjudication hearings. They include the requirement of timely notice of the proceedings, the right to counsel, the right of confrontation and examination, and the privilege against self-incrimination. *In re* Gault, 387 U.S. 1 (1967). *In re* Winship, 397 U.S. 358 (1970), added the requirement that delinquency be proved beyond a reasonable doubt. Breed v. Jones, 421 U.S. 519 (1975), applied the double jeopardy clause of the fifth amendment to juvenile court adjudicatory hearings.

7. McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971). In *McKeiver*, the Court held that trial by jury in the juvenile courts' adjudicative stage is not constitutionally required. This holding is consistent with the Court's earlier statement that juvenile hearings need not conform to "all of the requirements of a criminal trial or even of the usual administrative hearing." Kent v. United States, 383 U.S. at 562.

Part I examines the right of access announced in *Globe Newspaper* and *Richmond Newspapers v. Virginia*.[8] Part II looks at the juvenile justice system and argues that extension of the right of access to juvenile hearings promotes the first amendment's underlying purposes. Part III analyzes the state's interests in confidential juvenile proceedings and preventing public identification of the juvenile offender. This Part argues that states may not mandate or routinely permit exclusion of the public from the juvenile courtroom. The juvenile court judge may, however, limit access to his courtroom when justified by an overriding state interest.

I. The Public Right of Access to Criminal Trials

In *Richmond Newspapers*,[9] a fragmented Supreme Court[10] recognized for the first time a constitutional[11] right of the public and the press[12] to attend criminal trials. This right, however, is not absolute;

8. 448 U.S. 555 (1980).

9. *Richmond Newspapers* arose out of a defendant's fourth trial for murder: his first conviction was reversed because evidence had been improperly admitted, and his next two trials ended in mistrials. 448 U.S. at 559. The trial judge closed the proceedings to the press and public after the defense counsel moved for closure, and the prosecutor did not object. 448 U.S. at 559-60. The newspaper company moved to vacate the closure order, and the trial court denied the motion. 448 U.S. at 560-61. The newspaper company then appealed to the Virginia Supreme Court, which denied the appeal. 448 U.S. at 562. The United States Supreme Court granted the newspaper company's petition for certiorari, and reversed. 448 U.S. at 563-81.

10. The Court produced seven opinions. Chief Justice Burger, joined by Justices White and Stevens, wrote a plurality opinion. 448 U.S. at 558. Justices White and Stevens also filed separate concurrences. 448 U.S. at 581 (White, J., concurring), 448 U.S. at 582 (Stevens, J., concurring). Justice Brennan, joined by Justice Marshall, concurred in the judgment, 448 U.S. at 584, as did Justices Stewart and Blackmun. 448 U.S. at 598 (Stewart, J., concurring), 448 U.S. at 601 (Blackmun, J., concurring). Justice Rehnquist dissented. 448 U.S. at 604. Justice Powell did not participate in the decision.

11. The Court considered and rejected a sixth amendment public right to attend pretrial suppression hearings in Gannett Co. v. DePasquale, 443 U.S. 368 (1979). Justice Stewart, writing for the majority, 443 U.S. at 370-94, concluded that the sixth amendment's guarantee of a public trial is for the defendant alone. Members of the public thus have no enforceable sixth amendment right to a public trial that can be asserted independently of the parties in the litigation. 443 U.S. at 379-91. Justice Stewart explicitly refused to decide whether the first amendment gives the public and press a right of access to pretrial hearings. Moreover, he found that "the actions of the trial judge here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments." 443 U.S. at 392. Justice Blackmun, joined by Justices Brennan, White, and Marshall, concurred in part and dissented in part. These Justices found a sixth amendment public right of access to trials and suppression hearings, but reserved the issue of a first amendment access right. 443 U.S. at 406-48 (Blackmun, J., concurring in part and dissenting in part). Justice Powell explicitly found a first amendment right of access to courtroom proceedings. 443 U.S. at 397-403 (Powell, J., concurring). Justice Rehnquist explicitly denied any right of access to judicial or other governmental proceedings. 443 U.S. at 403-06 (Rehnquist, J., concurring).

12. The plurality found that the rights of the press were coextensive with the public's right of access. *Richmond Newspapers*, 448 U.S. at 572-73 (plurality opinion). This finding follows the Court's holding in the prison access cases. *See* Houchins v. KQED, 438 U.S. 1, 11 (1978) (plurality opinion); Pell v. Procunier, 417 U.S. 817, 834-35 (1974); Saxbe v. Washington Post, 417 U.S. 843, 850 (1974). Justice Brennan, however, believes that the question whether the

a trial judge may close a criminal trial if "an overriding interest articulated in findings"[13] outweighs the public's right of access. As with other first amendment guarantees, the right to attend criminal trials is subject to reasonable time, place and manner restrictions.[14]

Two years later, *Globe Newspaper* "extended, or at least read generously, *Richmond Newspapers*."[15] The Court held that a state mandatory closure statute, which closed the courtroom during the testimony of a minor victim in a sexual offense trial, violated the public's right to attend criminal trials.[16] Justice Brennan, writing for the *Globe* majority, stated that although the right of access is not absolute, the circumstances justifying exclusion of the public and the press from criminal trials are limited. The state must show "that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[17] The trial court must balance the state's interest in closure against the public's first amendment right of access on a case-by-case basis. Thus, a *mandatory* courtroom closure rule is inappropriate, as the strength of the state's interest will vary with the circumstances of each case.[18]

The Supreme Court offers two broad justifications for a public right of access to criminal trials. First, it identifies the first amendment's structural role in securing and fostering a republican form of

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press has greater access rights than the public remains open. 448 U.S. at 586 n.2 (Brennan, J., concurring).

13. 448 U.S. at 581 (plurality opinion).

14. 448 U.S. at 581 n.18 (plurality opinion). The Supreme Court has consistently held that activities protected by the first amendment are subject to reasonable time, place and manner restrictions. Such restrictions "may not be based upon either the content or subject matter of speech" and must "serve a significant governmental interest." *See* Heffron v. International Socy. for Krishna Consciousness, 452 U.S. 640, 648-49 (1981) (citations omitted) (upholding as a reasonable place and manner restriction a Minnesota State Fair rule confining the sales and solicitation activities of Krishna religion members to a fixed location); *see also* Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining as a reasonable time, place, and manner regulation a local ordinance forbidding disturbing noises in the vicinity of a building in which a school is in session); Adderley v. Florida, 385 U.S. 39 (1966) (upholding the application of a local trespass law to people demonstrating on city jail grounds); Kovacs v. Cooper, 336 U.S. 77 (1949) (sustaining a local ordinance against the emission of loud and raucous noises on public streets as applied to a sound truck); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a local ordinance forbidding street parades without a license).

15. Kamisar, Globe Newspaper: *The Court Balks at Mandatory Closure Rules — Even for Specific Testimony*, in 4 J. CHOPER, Y. KAMISAR, & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82, at 121, 123 (1983). Professor Kamisar explained that *Richmond Newspapers* could have been read to prohibit only trial closures *in toto*. Thus, temporary privacy for specific testimony (which was at issue in *Globe Newspaper*) would be permissible. Alternatively, the Court could have refused to extend the right of access to the facts of *Globe Newspaper*, *see* text at note 16 *infra*, due to the absence of an unbroken history of openness in cases involving the sexual abuse of minors. *See* note 34 *infra* and accompanying text.

16. Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2622 (1982).

17. 102 S. Ct. at 2620.

18. 102 S. Ct. at 2621.

government.[19] The "core purpose" of the first amendment[20] is to ensure that members of a democracy obtain information they need to govern themselves effectively.[21] Open criminal trials fulfill this structural role by educating the public about the legal system.[22] Such information promotes informal discussions about governmental affairs, instills confidence in the fair administration of justice,[23] and inspires respect for the rule of law.[24] Criminal trials, moreover, are the main source of information about "[j]udges, prosecutors, and police officials [who] often are elected or are subject to some control

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19. *See Globe Newspaper*, 102 S. Ct. at 2620; *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

20. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM (1960). Meiklejohn believed that self-government is the essence of our political system. We as citizen-governors must have access to all information relevant to our political decisions. To ensure this success, Meiklejohn advocated an absolute first amendment protection for "political speech":

> [The First Amendment] does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said. . . .
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> . . . [C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. [T]o be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval.

Id. at 26-28.

Meiklejohn's views have profoundly influenced the Supreme Court's view of the first amendment. Professor Kalven has asserted that the Supreme Court essentially adopted Meiklejohn's thesis in the watershed freedom of the press case, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209. Justice Brennan has apparently endorsed Kalven's view of the case. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (applying the Meiklejohn thesis to the area of broadcast regulation); Bollinger, *Elitism, the Masses and the Idea of Self-Government: Ambivalence About the "Central Meaning of the First Amendment"*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 99 (R. Collins ed. 1980). Professor Bollinger writes that "[t]oday it is widely assumed that Meiklejohn's theory is predominant in our First Amendment thinking. . . ." *Id.* at 99. However, he concludes that "the Meiklejohn view does not have such an exclusive hold on our legal doctrine as many appear to believe, or would have us believe." *Id.* at 106. Professor Bollinger finds first amendment theory to be an uneasy combination of two ideas: the Meiklejohn view that the first amendment should absolutely protect the flow of information to rational citizen-governors, and an elitist view that the first amendment allows government to shield citizens from harmful or unduly persuasive information.

21. *See Globe Newspaper*, 102 S. Ct. at 2620; *Richmond Newspapers*, 448 U.S. at 575; *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (notes "the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny.").

22. *See Richmond Newspapers*, 448 U.S. at 572 (plurality opinion).

23. *See Globe Newspaper*, 102 S. Ct. at 2620; *Richmond Newspapers*, 448 U.S. at 570-72 (plurality opinion).

24. *Richmond Newspapers*, 448 U.S. at 570-72 (plurality opinion), 594-95 (Brennan, J., concurring).

by elected officials."[25] If citizens are to make intelligent decisions concerning the judicial system, they must be able to observe and communicate about the criminal trial process.[26]

Similarly, the first amendment fulfills its structural role in securing a republican form of government by checking abuses of official power.[27] Public officials who participate in criminal trials — judges, prosecutors, and police officers — are often vested with wide discretion in performing their duties.[28] Abuse of their power, moreover, can seriously harm both the individuals before the court and society at large.[29] Subjecting criminal trials "to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[30]

Second, the *Richmond Newspapers* plurality relies heavily on the "unbroken, uncontradicted history" of open criminal trials to find a first amendment right of access.[31] The *Globe Newspaper* majority agreed that the history of open criminal trials supports recognition of

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25. Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

26. One commentator recently suggested a different justification for public access to government held information:

> Not only does the public *need* information to exercise its responsibilities of citizenship, but, in a most fundamental sense, data in the hands of government *belongs* to the public, having been collected through use of taxpayers' money and by the exercise of authority derived from the people as a whole. For government officials to hold back material from those to whom it belongs, without exceptionally good reason, is the height of presumptuousness.

F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 368-69 (1981).

27. *See Globe Newspaper*, 102 S. Ct. at 2620; *Richmond Newspapers*, 448 U.S. at 569 (plurality opinion), 596 (Brennan, J., concurring). *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B. FOUND. RESEARCH J. 521. Professor Blasi explains that self-important public officials, enjoying relative immunity from public skepticism and occupying positions of power, can inflict serious damage unless their behavior is regulated by public scrutiny. *Id.* at 540-41. He argues that restrictions on access to information about official behavior should be upheld only if the restrictions substantially promote an important government objective that cannot be achieved by less restrictive alternatives. *Id.* at 609.

28. For general accounts of the role of discretion in the administration of justice, see K. DAVIS, DISCRETIONARY JUSTICE (1969); E. LEVI, THE USE OF DISCRETION IN THE LEGAL SYSTEM (1978). For accounts of the discretion of judges and police officers, see K. DAVIS, POLICE DISCRETION (1975); W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); T. LEE & B. OVERTON, JUDICIAL DISCRETION (1974). For a comprehensive list of cases and comments about prosecutorial discretion, see Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1540 n.71 (1981); Note, *Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After* United States v. Goodwin, 81 MICH. L. REV. 194, 194 n.3 (1982).

29. For descriptions of abuse of judicial, police, and prosecutorial discretion and its disastrous consequences, see K. DAVIS, DISCRETIONARY JUSTICE 12-14, 25-26, 52-96, 162-214 (1969); K. DAVIS, POLICE DISCRETION 143-44 (1975); W. GAYLIN, *supra* note 28, at 28-44, 182-233; Note, *supra* note 28, at 195 n.5.

30. *In re* Oliver, 333 U.S. 257, 270 (1948).

31. *Richmond Newspapers*, 448 U.S. at 573. The Chief Justice's thorough summary of the relevant history begins with a discussion of "the days before the Norman Conquest," 448 U.S. at 565, and continues through to the present. 448 U.S. at 574.

a constitutional right to attend criminal trials.[32] Yet, in striking down the Massachusetts mandatory closure statute,[33] the *Globe Newspaper* majority ignored "a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors."[34] Thus, although the Court relied heavily on historical analysis to establish a first amendment right of access, history may play a more limited role in determining the scope of that right.

The Supreme Court has not yet determined the scope of the right articulated in *Richmond Newspapers* and *Globe Newspaper*. Although both cases involved access to criminal trials, the Court's reasoning may suggest a constitutional right of access to other types of judicial proceedings.[35] The next two sections of this Note apply the reasoning of *Richmond Newspapers* and *Globe Newspaper* to juvenile court proceedings and conclude that the first amendment protects the right of the public to attend juvenile delinquency hearings.

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32. *Globe Newspaper*, 102 S. Ct. at 2619.

33. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1980).

34. *Globe Newspaper*, 102 S. Ct. at 2624 (Burger, C.J., dissenting).

35. In his plurality opinion in *Richmond Newspapers*, Chief Justice Burger hinted that the public right of access to criminal trials extends to civil trials as well: "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." 448 U.S. at 580 n.17. *See also* Kamisar, *supra* note 15, at 128 (stating that Professors Choper, Kamisar, and Tribe concluded from studying the various opinions in *Richmond* that the right of access probably extends to civil trials). *But see Globe Newspaper*, 102 S. Ct. at 2623 (O'Connor, J., concurring) ("I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.").

The Third Circuit has extended the *Richmond Newspapers* public right of access to pretrial suppression, due process, and entrapment hearings. *See* United States v. Criden, 675 F.2d 550, 554-57 (3d Cir. 1982). The court based its decision on the current societal interests that are enhanced by access, rather than the history of the proceedings. As the pretrial hearings were relatively new and had "grown immensely" in importance in the past two hundred years, the court found the historical analysis portion of the *Richmond Newspapers* opinions to be irrelevant. 675 F.2d at 555. However, the California Supreme Court took the opposite approach in San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982). The court upheld § 868 of the California Criminal Code, which mandated closure of the preliminary examination of criminal defendants upon the defendant's request. CAL. PENAL CODE § 868 (West 1970). The state legislature subsequently amended § 868 to permit exclusion of the public only when the defendant requests and the magistrate finds that such "exclusion . . . is necessary in order to protect the defendant's right to a fair and impartial trial." CAL. PENAL CODE § 868 (West Supp. 1983); *see* Kamisar, *supra* note 15, at 131. However, "the case is still a significant precedent on the meaning of the First Amendment 'right of access.'" *Id.* Moreover, three other states mandate closure of the preliminary hearing upon the defendant's request: IDAHO CODE § 19-811 (1979); IOWA CODE § 813.2 Rule (2)(4)(d) (1981); MONT. CODE ANN. § 46-10-201 (1981). In Professor Kamisar's opinion, these statutes are unconstitutional. *See* Kamisar, *supra*.

Although the Supreme Court rejected a sixth amendment public right of access to pretrial suppression hearings in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), this decision probably does not limit the *Richmond Newspapers* and *Globe Newspaper* right of access. Justice Stewart's majority opinion reserved the first amendment issue, but went on to state that the case did not present a violation of any first amendment access right. *See* note 11 *supra*. However, the *Gannett* decision generated confusion almost from the moment it was handed down. *See Richmond Newspapers*, 448 U.S. at 602 (Blackmun, J., concurring). The *Richmond Newspapers* and *Globe Newspaper* decisions fail to reveal what, if anything, remains of *Gannett*.

II. BENEFITS OF ACCESS TO THE JUVENILE JUSTICE SYSTEM

The juvenile court system, established in most states shortly after the turn of the century,[36] was the product of a broad reform movement to improve the welfare of children. Reformers wanted to remove children from the adult criminal system, which focused on determining guilt and administering punishment.[37] Instead, the youthful offender would be "taken in hand by the state, not as an enemy but as a protector"[38] in a nonadversarial proceeding. The juvenile court judge, acting "as a wise and merciful father handl[ing] his own child,"[39] would decide each case according to the offender's individual needs.[40] Thus, the juvenile court system would reform, rather than punish, young offenders.

But "there is a gap between the originally benign conception of the system and its realities."[41] Currently, juvenile delinquency hearings closely resemble adult criminal proceedings. First, the two court systems share the primary goal of protecting the community from dangerous and disturbing behavior.[42] The juvenile court sys-

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36. During the early part of United States history, children above seven years of age were arrested and tried as adults. Children under seven were considered incapable of possessing criminal intent. *See In re* Gault, 387 U.S. 1, 14 (1967); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

The first juvenile court statute was adopted in 1899. 1899 ILL. LAWS 131. By 1917, juvenile courts had been established in all but three states. U.S. CHILDREN'S BUREAU, REPORT TO THE CONGRESS ON JUVENILE DELINQUENCY 7 (1960), *cited in* Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access,"* 13 U.C.D. L. REV. 123, 126 n.8 (1979).

37. *See In re* Gault, 387 U.S. 1, 14-17 (1967) (recounting the history of the reform movement); F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 46 (1964); Mack, *supra* note 36. The Supreme Court views the reform movement as a response to the need for procedural reform: "The early reformers were appalled by adult procedures and penalities, and by the fact that children could be given long prison sentences . . . ." *In re* Gault, 387 U.S. at 15. At least one commentator, however, argues that the need for sending juvenile offenders to institutions other than prisons, rather than procedural reforms, lay at the heart of the reform movement. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1120-21 (1970).

38. Mack, *supra* note 36, at 107.

39. *Id.*

40. *See, e.g.*, D. MATZA, DELINQUENCY AND DRIFT 114-15 (1964) ("The [juvenile court] principle of individualized justice suggests that disposition is to be guided by a *full understanding* of the client's personal and social character and by his 'individual needs.'") (emphasis in original).

41. Breed v. Jones, 421 U.S. 519, 528 (1975).

42. *See* F. ALLEN, *supra* note 37, at 53:

> [I]t is . . . both inaccurate and deceptive to describe the operation of the juvenile court in this area as the exercise of a rehabilitative or therapeutic function. . . . The primary function being served in these cases . . . is the temporary incapacitation of children found to constitute a threat to the community's interest. . . . In a great many cases the juvenile court must perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behavior.

See also UNITED STATES TASK FORCE ON JUVENILE DELINQUENCY, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 8 (1967) [hereinafter cited as TASK FORCE REPORT] ("While statutes, judges, and commentators still talk the language of compassion, help,

tem is not essentially therapeutic and rehabilitative in nature. Rather, like the criminal justice system, the juvenile courts act in the offender's interest only to the extent that such efforts are compatible with the safety and security of the community.[43]

Second, the consequences of an adjudication of delinquency can be as severe as a criminal conviction. Some states permit incarceration of juvenile delinquents in adult prisons,[44] and all juvenile courts may commit juvenile offenders to some institution.[45] The Supreme Court has found that such commitments are the practical and constitutional equivalent of incarceration in prison.[46] Further, an adjudication of delinquency, often as serious as a criminal conviction,[47] haunts the offender after his release. The FBI, the military, govern-

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and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders — retribution, condemnation, deterrence, incapacitation — are involved in the disposition of juvenile offenders too.").

43. *See* F. ALLEN, *supra* note 37, at 51-56; TASK FORCE REPORT, *supra* note 42, at 9. The TASK FORCE REPORT observed that the "guiding consideration" for the juvenile court is protection of the safety of a community. Rehabilitating offenders through individualized handling is one means to secure this goal.

44. Courts in Maine and Ohio have held that juvenile delinquents may be incarcerated in adult correctional facilities. *See* Morton v. Hayden, 142 A.2d 37 (Me. 1958); Gerak v. State, 22 Ohio App. 357, 153 N.E.2d 902 (1920); *see also* Wilson v. Coughlin, 259 Iowa 1163, 147 N.W.2d 175 (1966) (sustaining the transfer of a sixteen-year-old from a youth training school to the state men's reformatory, as reformatory was only place of custody which could provide proper care and training); *In re* Parker, 225 Pa. Super. 217, 310 A.2d 414 (1973) (sustaining commitment of a juvenile to an adult correctional facility, but ordering the adult facility to provide separate accommodations for the juvenile); *In re* Society for Prevention of Crime, Inc., 183 Misc. 595, 49 N.Y.S.2d 587 (1944) (upholding commitment of juvenile delinquents to city prison pending acceptance by, and transportation to, the state training school for boys).

45. It is true that juvenile courts may confine the juvenile offender only until he reaches the age of majority, which is 18 in some states and 21 in others. *See, e.g.*, ARK. STAT. ANN. § 45-406.1 (Supp. 1981) (18 years old); MICH. COMP. LAWS ANN. § 712A.5 (Supp. 1982) (18 years old); R.I. GEN. LAWS § 14-1-6 (Supp. 1982) (21 years old); S.D. CODIFIED LAWS ANN. § 26-8-49.1 (Supp. 1982) (21 years old). *But see* CAL. WELF. & INST. CODE § 607 (West Supp. 1982) (jurisdiction of juvenile court continues until offenders committed to the Youth Authority reach 23 years of age). However, this confinement can exceed the maximum statutory sentence for adults committing the same offense. The court observed in *In re* Gault that "[f]or the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, [the juvenile] was committed to custody for a maximum of six years." 387 U.S. 1, 29 (1966).

46. *See In re* Gault, 387 U.S. 1, 27 (1967) (footnotes omitted):

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

47. *See In re* Winship, 397 U.S. 358, 367 (1970) (noting the stigma and possibility of confinement resulting from an appearance before the juvenile court); *In re* Gault, 387 U.S. at 36 (juvenile delinquency proceedings are "comparable in seriousness to a felony prosecution"). A Vermont court observed that "[i]t is true that convicted adults may serve long terms of imprisonment, whereas juveniles cannot be held beyond age eighteen. Often, however, where the delinquency is for a misdemeanor, the confinement for a juvenile is potentially longer than the maximum statutory sentences" for adults. *In re* Certain Juvenile Delinquency Proceedings, 7

ment agencies, and private employers are able to obtain information about a juvenile's past court contacts.[48] In short, the term "delinquent" has "come to involve only slightly less stigma than the term 'criminal' applied to adults."[49]

The juvenile justice system of today bears little resemblance to the one contemplated by the early reformers. Although theory and practice often diverge, the contrast is striking in the context of the juvenile justice system:

> In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services — by society generally — as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.[50]

In light of the similarities between the juvenile and criminal justice systems, the first amendment should view the juvenile courtroom and the criminal courtroom alike.[51]

Access to juvenile delinquency hearings, like access to criminal trials, fulfills the first amendment's structural role in securing a republican form of government.[52] First, public attendance at juvenile delinquency hearings will promote "free public discussion of government affairs."[53] The public has a deep interest in the juvenile system,[54] which bears the responsibility for meeting the "single most pressing and threatening aspect of the [American] crime problem."[55]

MEDIA L. REP. (BNA) 1740, 1743-44 (Vt. Dist. Ct., Chittenden Cir. July 8, 1981), *revd. sub nom. In re* J.S., 140 Vt. 458, 438 A.2d 1125 (1981).

48. *See In re* Gault, 387 U.S. 1, 24-25 (1967). The Court noted that most juvenile judges have discretionary authority to disclose court records, and that many of them release records routinely or upon request. More importantly, many police departments release their juvenile arrest records upon request. In addition, some private employers word their application forms to produce information about past juvenile court involvement. *See also* Lemert, *The Juvenile Court — Quest and Realities*, in TASK FORCE REPORT, *supra* note 42, at 93 ("Employers denied information from juvenile courts often get the desired facts from the police.").

49. *In re* Gault, 387 U.S. at 23-24.

50. TASK FORCE REPORT, *supra* note 42, at 9.

51. *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) ("[T]he juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment . . .").

52. *See* notes 19-30 *supra* and accompanying text.

53. Saxbe v. Washington Post, 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

54. Richmond Newspapers v. Virginia, 448 U.S. at 573 n.9 (1980) (plurality opinion) (" 'the public have a deep interest in trials' ") (quoting Pennekamp v. Florida, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring)).

55. TASK FORCE REPORT, *supra* note 42, at 1. Juvenile crime is a huge problem in the United States. The Attorney General's Task Force on Violent Crime reported that in 1979 juveniles up to 18 years old accounted for about 20% of all violent crime arrests, 44% of all

Suppression of information relating to the performance of the juvenile courts prevents the public from making informed decisions about both the reform and the administration of the juvenile justice system. The current financial crisis facing the juvenile system, for example, is due in part to public ignorance about the system's problems.[56] Juvenile court judges, moreover, are usually elected to the bench.[57] Access to juvenile court hearings would permit the public to evaluate the judge's performance, thus enabling citizens to cast their votes intelligently. In short, access to the juvenile courtroom would provide the public with the information it needs to exercise rationally its control over the juvenile justice system.

Second, access to juvenile delinquency hearings would function as a check[58] on the abuse of power by judges, probation officers,[59] and other public officials. The nature of the juvenile justice system, even more than the criminal system, suggests a compelling need to check the exercise of government power. Juvenile court judges, for example, exercise more discretion than their criminal trial counterparts.[60] Under the juvenile court's philosophy of individualized justice,[61] the juvenile's character and needs, rather than his offense, guide disposition of the case.[62] Such a system relies heavily on subjective judgments,[63] making the "compliant, biased, or eccentric

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serious property crime arrests, and 39% of overall serious crime arrests. If juveniles in the 18- to 20-year range are included, the figures are 38% of all violent crime arrests, 62% of all serious property crime arrests, and 57% of all serious crime arrests. Moreover, only 3 to 15% of delinquent acts result in a police contact. A representative sample of delinquent males admitted to committing from 8 to 11 serious crimes for each time they were arrested. *See* U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 81 (1981).

56. *See* D. BESHAROV, JUVENILE JUSTICE ADVOCACY (1974) (noting the juvenile court's relative isolation from the community); TASK FORCE REPORT, *supra* note 42, at 7, 38 (low-level of information flowing to the public may explain why society has not adequately funded the juvenile justice system); Conway, *Publicizing the Juvenile Court: A Public Responsibility*, 16 JUV. CT. JUDGES J. 21, 22-24 (1965) (The lack of adequate funding is due to the public's ignorance about the juvenile court. The system's inadequate financial resources undermine its philosophy of individualized care for juvenile offenders. "The juvenile court idea will only be tried . . . when the people are aware of the deficiencies in services and in personnel in the juvenile courts").

57. *See* TASK FORCE REPORT, *supra* note 42, at 6.

58. *See* notes 27-30 *supra* and accompanying text.

59. "The juvenile court judge's right-hand man is the probation officer." TASK FORCE REPORT, *supra* note 42, at 6. The probation officer is responsible for "making social studies of cases referred to the court and supervising juveniles placed on probation." *Id.*

60. *See* TASK FORCE REPORT, *supra* note 42, at 5 ("Most juvenile court judges have broad discretion in disposing of cases, being empowered to dismiss the case, warn the juvenile, fine him, place him on probation, arrange for restitution, refer him to an agency or treatment facility, or commit him to an institution.").

61. *See* notes 36-40 *supra* and accompanying text.

62. *See* D. MATZA, *supra* note 40, at 111-18.

63. Matza calls the juvenile court "a system of rampant discretion." D. MATZA, *supra* note 40, at 116. This may change in the near future. There is some evidence of a recent trend toward juvenile court dispositions "commensurate with the seriousness of the offense commit-

judge"[64] a particular hazard. Juvenile court judges, moreover, are often less qualified and less competent than other judges.[65] As a result, juvenile courts often commit "much more extensive and fundamental error than is generally found in adult criminal cases."[66] Because juvenile cases are only rarely appealed,[67] public scrutiny of the juvenile justice system takes on added importance as a check against official misconduct. Finally, judges, not juries, decide most delinquency cases.[68] Thus, the juvenile is unable to appeal to the community conscience, as embodied in the jury, to protect against abuse of government power.[69] The Supreme Court's refusal to ex-

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ted." E. SCHUR, INTERPRETING DEVIANCE 467 (1979). Schur attributes this trend to a desire to improve the "predictability, consistency, and fairness" of juvenile court outcomes.

64. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

65. A 1973 study revealed that 86.4% of judges with juvenile jurisdiction devote half of their time or less to juvenile matters, and 66.7% spend one quarter of their time or less. More than ten percent of juvenile court judges did not attend law school, and only 85.6% have been admitted to the bar. In towns with populations of 10,000 or less, 31.4% of the juvenile court judges indicated that they had not been admitted to the bar. *See* Smith, *A Profile of Juvenile Court Judges in the United States*, JUV. JUST., Aug. 1974, at 27, 32-33.

66. RLR v. State, 487 P.2d 27, 38 (Alaska 1971) (footnote omitted) (reversing adjudications of delinquency because the juvenile was not present at the hearing).

67. TASK FORCE REPORT, *supra* note 42, at 5.

68. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971) (over 30 jurisdictions deny by statute the right to a jury trial). Fourteen states give juvenile offenders the right to a trial by jury. ALASKA STAT. § 47.10.070 (1979); COLO. REV. STAT. § 19-1-106(4) (1978); KAN. STAT. ANN. § 38-808(a) (1981) (judge may order jury trial in cases involving certain felonies); MASS. ANN. LAWS ch. 119, § 55A (Michie/Law. Co-op. Supp. 1982); MICH. COMP. LAWS § 712A.17(2) (Supp. 1982); MISS. CODE ANN. § 43-23-15 (1972); MONT. CODE ANN. § 41-5-521(1) (1981); N.M. STAT. ANN. § 32-1-31A (1978); OKLA. STAT. ANN. tit. 10, § 1110 (West Supp. 1982); S.D. CODIFIED LAWS ANN. § 26-8-31 (1976) (court may order trial by jury); TEX. FAM. CODE ANN. § 54.03(c) (Vernon Supp. 1982); W. VA. CODE § 49-5-6 (Supp. 1975); WIS. STAT. ANN. § 48.31(2) (West Supp. 1982); WYO. STAT. § 14-6-224(a) (Supp. 1982).

69. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 554-57 (1971) (Brennan, J., concurring in part and dissenting in part) (juvenile hearings contain adequate safeguards against improper judicial behavior only when they are open to the public or when they include trial by jury).

Some authorities have suggested that recognizing a minor's right to demand a public trial would satisfy the goals of fair juvenile proceedings and open information for the public. *See* STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, REPORT OF THE NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION 328-29 (1980) [hereinafter cited as NAC STANDARDS]; INSTITUTE OF JUDICIAL ADMINISTRATION — AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS PROJECT, STANDARD RELATING TO ADJUDICATION 70-72 (Tent. Draft 1977) [hereinafter cited as IJA/ABA STANDARDS]; NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 380-81 (1976) [hereinafter cited as TASK FORCE STANDARDS]. However, the public trial right is not a satisfactory substitute for a public right of access. The right to a jury trial relies on the willingness of the minor or his representative to request a public trial from the judge: "If the child must bear the burden of asking for a public hearing, the request may be construed as an implicit criticism of the judge's impartiality." IJA/ABA STANDARDS, *supra*, at 72 (citing Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171, 1186 (1966)). Both the NAC STANDARDS, *supra*, at 328-29, and the IJA/ABA STANDARDS, *supra*, at 72-74, recognize that further safeguards are appropriate. They suggest that the juvenile court judge should have discretion to admit interested parties to a closed hearing, provided those parties agree not to identify the juvenile. However, these standards leave the access decision to the discretion of the juvenile court judge, which makes access uncertain. In contrast, recognition of a public

tend to juveniles the right to a jury trial[70] similarly magnifies the need for public scrutiny to guard against judicial misconduct. These features of the juvenile justice system suggest an especially strong need for a first amendment right of access to juvenile delinquency hearings.

In addition to its functional approach to the first amendment, the Court undertook an historical analysis to support the right to attend criminal trials, though history may play a more limited role in determining the scope of that right.[71] The history of juvenile delinquency hearings fails to reveal a strong tradition of openness. Juvenile courts have allowed varying degrees of public access since their inception.[72] Yet, although juvenile proceedings do not share a long tradition of openness with criminal trials, their history fails to reflect a strong tradition of secrecy.[73] The history of the juvenile justice system, therefore, offers little guidance to resolution of the access issue.

Further, history should play a limited role in defining the scope of the right to attend judicial proceedings. Notwithstanding "the favorable judgment of experience" and "the gloss of history"[74] that the Constitution carries, the Court should avoid a rigid historical interpretation of the first amendment when the result would offend the amendment's underlying purposes. Limiting the right of access to proceedings that have historically been open to the public severely

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right of access would help to ensure the presence of impartial observers. This would increase the likelihood of a fair trial and the dissemination of information about the operation of the juvenile court.

70. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

71. *See* notes 31-34 *supra* and accompanying text.

72. *See* COSULICH, JUVENILE COURT LAWS OF THE UNITED STATES 50 (1939) (In 1939, six states and the District of Columbia excluded the public from juvenile courts and twenty-four states permitted excluding the public from the juvenile courtroom). *Compare* Tuthill, *History of the Children's Court in Chicago*, in CHILDREN'S COURTS IN THE UNITED STATES, H.R. DOC. No. 701, 58th Cong., 2d Sess. 3 (1904) [hereinafter cited as CHILDREN'S COURTS] (juvenile hearing in open court), *and* Eliot, *The Change Wrought by the Juvenile Probation System in St. Louis*, in CHILDREN'S COURTS 162 (observers present in juvenile courtroom), *with* Murphy, *History of the Juvenile Court of Buffalo*, in CHILDREN'S COURTS 10 (only the "defendants, the complainants, and the court officers and witnesses" were allowed at the trials.), *and* Lindsey, *Additional Report on Methods and Results*, in CHILDREN'S COURTS 80 (juvenile cases heard on Saturdays and after 5:00 P.M. during the week. The afternoon sessions were held in the judge's chambers, "the probation officer being present with his reports, also the parents and only those interested."). *But see In re* J.S., 140 Vt. 458, 464, 438 A.2d 1125, 1127 (1981) (denying public access to juvenile court proceedings citing a tradition of juvenile court closure).

73. The Supreme Court has upheld restrictions on public access to places with a strong tradition of secrecy. In each instance, the Court held that the restriction did not violate the first amendment, as it protected a substantial government interest unrelated to the suppression of free expression. *See* Brown v. Glines, 444 U.S. 348 (1980) (Air Force base); Greer v. Spock, 424 U.S. 828 (1976) (Army base); Pell v. Procunier, 417 U.S. 817 (1974) (state prison); Adderley v. Florida, 385 U.S. 39 (1966) (county jail).

74. *Globe Newspaper*, 102 S. Ct. at 2619 (quoting Richmond Newspaper v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring)).

limits public "access to information about the operation of [the] government, including the Judicial Branch,"[75] and impairs society's ability to gather the information it needs for effective self-government. The checking value of the first amendment, moreover, would suffer serious erosion if the government could pursue "policies and practices that reduce the amount and quality of information disseminated to the public . . . simply because they serve the convenience, or embody the traditional prerogatives, of the government."[76] Thus, just as the Supreme Court refused to restrict the first amendment right of peaceable assembly to only those places *historically* used for the exercise of first amendment rights,[77] the right of access to judicial proceedings should not be limited only to those proceedings historically open to the public.

III. COUNTERVAILING STATE INTERESTS

The right of access articulated in *Richmond Newspapers* and *Globe Newspaper* is not absolute, but rather must yield when closure would protect a compelling state interest.[78] The state, however, must show that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[79] This Part considers whether the state's legitimate interests in preserving the environment of the juvenile court and the anonymity of juveniles accused of crime amount to "an overriding interest articulated in findings,"[80] and how the courts may most appropriately "narrowly tailor" the denial of access to accommodate such an interest.

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75. *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring).

76. Blasi, *supra* note 27, at 609-10.

77. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Supreme Court set forth its doctrine governing the exercise of first amendment rights in public areas: "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116 (footnote omitted). Some commentators suggest that this doctrine "provides the most appropriate analogy for shaping a right of access test." *See* Kamisar, *Right of Access to Information Generated or Controlled by the Government:* Richmond Newspapers *Examined and* Gannett *Revisited*, in 2 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980, at 145, 164-65 (1981); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980). In the context of juvenile delinquency hearings, the "incompatibility" test would give the public a presumptive right to attend the hearings. The court could close delinquency hearings only by demonstrating the incompatibility of access with the normal activity of the juvenile court, given the particular facts of the case. *Cf. Grayned*, 408 U.S. at 116; Kamisar, *supra*, at 164-65; Note, *supra*, at 936-39. This test closely resembles the *Globe Newspaper* and *Richmond Newspapers* right of access when applied to delinquency hearings. *See* notes 78-80 *infra* and accompanying text.

78. *See* notes 13, 17 *supra* and accompanying text.

79. *Globe Newspaper*, 102 S. Ct. at 2620.

80. *Richmond Newspapers*, 448 U.S. at 581 (plurality opinion).

A. *Countervailing Interests*

1. *Intimate and Informal Juvenile Proceedings*

States exclude the public from juvenile delinquency hearings in part to ensure that they proceed in an informal, intimate, and protective setting.[81] Though some fear that a public right of access would destroy this arrangement,[82] the benefits of access on the trial process outweigh the marginal loss of intimacy.

Juvenile hearings cannot accurately be described as intimate. Most state statutes allow the juvenile court judge to admit "interested parties" into the juvenile courtroom.[83] Although the definition of "interested parties" varies from state to state,[84] students, social workers, lawyers, and observers of the court system frequently attend juvenile delinquency hearings.[85] The presence of these persons[86] "vitiates the promise of confidentiality, without giving the benefit of a truly open hearing."[87] Accordingly, the presence of several additional courtroom observers, some of whom may be reporters, would not significantly decrease the current level of intimacy in juvenile court proceedings.

To the extent that the press fulfills its checking role,[88] however,

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81. The Supreme Court has endorsed the ideal of an "intimate, informal protective proceeding" for the accused juvenile. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). The language of many juvenile court statutes reveals that states use this ideal to justify closure of delinquency hearings. *See, e.g.*, ALASKA STAT. § 47.10.070 (1979) (court may conduct hearing in informal manner); HAWAII REV. STAT. § 571-41 (Supp. 1980) (same); OR. REV. STAT. § 419.498(1) (1981) (same).

82. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (The Court expressed concern that a trial by jury for juveniles would introduce "the formality, and the clamor of the adversary system and, possibly, the public trial" into the juvenile court system.).

83. *See, e.g.*, MINN. STAT. § 260.155(1) (1980); 42 PA. CONS. STAT. ANN. § 6336(d) (Purdon 1982); WYO. STAT. § 14-6-224(b) (1978).

84. Many states give the juvenile court judge discretion to admit persons having "a proper interest in the proceedings or the work of the court." *See, e.g.*, the statutes listed in note 83 *supra*. However, there are variations from state to state. *Compare* ALASKA STAT. § 47.10.070 (1979) (judge may admit individuals whose attendance is compatible with the minor's best interests) *with* UTAH CODE ANN. § 78-3a-33 (1977) (judge may admit members of the "public information" media to hearings concerning offenses that would have been felonies if committed by an adult).

85. *See* IJA/ABA STANDARDS, *supra* note 69, at 71:

> [B]ecause both model legislation and many state statutes allow for the presence of "interested persons" at the judge's discretion, . . . juvenile hearings cannot truly be described as confidential. Frequent attendance by students, social workers, lawyers, and observers of the court system indicates that one need not be "interested" in the child in order to qualify as an "interested person."

86. The presence of "interested parties" at juvenile delinquency hearings may suggest that a public right of access is unnecessary, as a sizeable audience already exists. However, the presence of such individuals is entirely at the discretion of the judge in most states. *See* note 3 *supra*. Further, those admitted to the courtroom may not report information they obtain, thus failing to fulfill the first amendment's structural role. *See* notes 19-30 *supra* and accompanying text.

87. IJA/ABA STANDARDS, *supra* note 69, at 71.

88. *See* notes 27-30 *supra* and accompanying text.

juvenile hearings may not only become less intimate, but more formal as well. Public access to juvenile delinquency hearings would cause juvenile court officials to adhere more closely to formalized procedures in order to avoid the appearance of arbitrary conduct. Such formality may undermine the delicate relationship between the juvenile court judge and the erring youth.[89]

Increased formality, however, will enhance the integrity of juvenile hearings.[90] The Supreme Court has criticized the procedural arbitrariness of juvenile courts, and has imposed a variety of due process requirements on the juvenile justice system.[91] The Court has recognized that imposition of due process requirements would increase the formality of the juvenile courtroom, yet has concluded that more formal proceedings are consistent with the goals of the juvenile justice system.[92] Because the juvenile justice system often bears a great resemblance to the criminal justice system,[93] the juvenile courts, no less than the criminal courts, should employ "procedures designed to assure fair and reliable determinations."[94] A first amendment right of access will help ensure that juveniles receive a fair and reliable hearing.

Informal juvenile delinquency hearings, moreover, may mislead juveniles and their parents into underestimating the seriousness of the proceedings.[95] The juvenile may feel deceived when harsh discipline follows the procedural laxness of the *parens patriae* posture.[96] The juvenile, feeling unfairly treated, may resist rehabilitation,[97] thus undermining the basic goal of the juvenile justice system.[98]

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89. *See* notes 36-40 *supra* and accompanying text.

90. *Cf. Globe Newspaper*, 102 S. Ct. at 2620 (public access to criminal trials enhances quality of fact-finding process and fosters an appearance of fairness); *Richmond Newspapers*, 448 U.S. at 569-70 (plurality opinion) (public access to criminal trials may discourage perjury, misconduct and biased decisions); *In re* Oliver, 333 U.S. 257, 270 n.24 (1947) (public trials come to the attention of witnesses unknown to the parties, who may come forward and give important testimony).

91. *See* note 6 *supra*.

92. *In re* Gault, 387 U.S. 1, 25-28 (1967).

93. *See* notes 41-51 *supra* and accompanying text.

94. TASK FORCE REPORT, *supra* note 42, at 9.

95. *See* Comment, *supra* note 36, at 159 n.132 ("informal and confidential juvenile court proceedings mislead minors and their parents into underestimating the seriousness of illegal acts").

96. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 564 (1971) (appendix to dissenting opinion of Douglas, J.) ("The real traumatic experience is the [juvenile's] feeling of being deprived of basic rights."); *In re* Gault, 387 U.S. 1, 26 (1967); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 21 ("The word 'help,' coming from such a person in a position of power, is, in the mind of the adolescent, a familiar signal of danger.") (footnote omitted).

97. *See* JUVENILE DELINQUENCY — ITS PREVENTION AND CONTROL 33 (1966), *quoted in In re* Gault, 387 U.S. 1, 26 (1967); Handler, *supra* note 96, at 21; D. MATZA, *supra* note 40, at 101-51.

98. *See* note 40 *supra* and accompanying text.

Recognition of a first amendment right of access to juvenile delinquency hearings would marginally decrease the intimacy of the courtroom. The juvenile hearing would also become a more formal proceeding. The juvenile justice system, however, will benefit from increased procedural formality without sacrificing too much courtroom intimacy.

2. *Public Identification of Juvenile Delinquents*

States justify closure of juvenile delinquency hearings in part because closure fulfills "the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' "[99] Access to juvenile delinquency hearings enables the press to publish the names of juvenile offenders[100] thus undermining the state's interest. Yet the harm sought to be avoided by prohibiting publication of the juvenile offender's identity remains speculative, while publication may in fact prove beneficial to society and the particular juvenile offender. The Supreme Court, though recognizing the legitimacy of the state's interest in closure, has held that when the state's interest in confidentiality of a juvenile offender's identity conflicts with constitutional rights, the former must yield.[101]

Although some alarmed observers argue that publicity and public identification would harm juvenile offenders, the harm attributable to a first amendment right of access would be minimal. First, publicity could provide delinquents the attention they seek through deviant behavior. Open hearings would "provide a deeply troubled youngster an opportunity to flaunt his unregeneracy,"[102] thus encouraging further delinquent acts.[103] However, it is not immediately apparent that publicity would have this effect on the juvenile, and

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99. *In re* Gault, 387 U.S. 1, 24 (1967).

100. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (state may not punish a newspaper for publishing name of a juvenile offender when such information was lawfully obtained); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (state may not restrain the dissemination of information obtained at a juvenile delinquency hearing that was open to the public). *Cf.* Nebraska Press Assn. v. Stuart, 427 U.S. 539, 568 (1976) ("[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (broadcasting company may publicize the lawfully obtained name of a rape victim because the state chose to place it in the public domain by including it in court records open to the public).

101. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Davis v. Alaska, 415 U.S. 308 (1974) (defendant's right of confrontation guaranteed by the sixth amendment is paramount to the state's interest in protecting a juvenile offender's record).

102. TASK FORCE REPORT, *supra* note 42, at 38.

103. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring); Davis v. Alaska, 415 U.S. 308, 319 (1974); Comment, *supra* note 36, at 155; *see also* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794 (1966).

absent empirical support,[104] it is impossible to evaluate this argument meaningfully. Further, in those states that allow the juvenile to open his delinquency hearing to the public,[105] a right of access would not provide the juvenile with any additional opportunity for attention.

Second, public information about juvenile court intervention may "label" the juvenile offender.[106] According to the labeling hypothesis, individuals learn their personal identity from the reactions they evoke from other members of society. By labeling a child "delinquent" in the public's eyes, juvenile court intervention causes the child to view himself as an enemy of society.[107] This alienation arguably encourages further delinquent acts.[108] In addition to alienating the juvenile, the "delinquent" label would reduce the offender's occupational and educational opportunities, further complicating rehabilitation.[109]

It is unclear, however, how much labeling would result from public access to delinquency hearings. Although the labeling hypothesis retains the support of many sociologists and social psychologists,[110] other studies suggest that the stigma of being classified a delinquent has been overestimated.[111] Nor does the incremental effect of publicity seem likely to intensify the psychological identifica-

104. *See* Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 124 (1958), *cited in* RLR v. State, 487 P.2d 27, 37 (Alaska 1971).

105. *See* note 3 *supra*.

106. *See generally* 1 NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, PREVENTING DELINQUENCY 135-52 (1977); Orlando & Black, *Classification in Juvenile Court: The Delinquent Child in Need of Supervision*, JUV. JUST., May, 1974, at 13, 19-22.

107. Orlando & Black, *supra* note 106, at 20 (quoting E. SCHUR, OUR CRIMINAL SOCIETY 117 (1969)).

108. *Id.*; *see also* Howard, Grisso & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 204, 208-11 (1977). Although this article has been cited as empirical evidence of the harmful effects of publicity on juvenile offenders, it is based on a case study of a single individual. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 108 n.1 (1979) (Rehnquist, J., concurring); *In re* Robert M., 109 Misc. 2d 427, 432, 439 N.Y.S.2d 986, 990 (N.Y. Fam. Ct. 1981).

109. *See* Lemert, *The Juvenile Court — Quest and Realities*, in TASK FORCE REPORT, *supra* note 42, at 91, 92 (the stigma of juvenile court intervention "gets translated into effective handicaps by heightened police surveillance, neighborhood isolation, lowered receptivity and tolerance by school officials, and rejections of youth by prospective employers.").

110. *See, e.g.*, M. FELDMAN, CRIMINAL BEHAVIOUR: A PSYCHOLOGICAL ANALYSIS 202-10 (1977); E. SCHUR, INTERPRETING DEVIANCE 156-61 (1979). *But see* THE LABELLING OF DEVIANCE (W. Gove ed. 1975).

111. *See* Foster, Dinitz & Reckless, *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 SOC. PROBS. 202 (1972) (Only a small proportion of a group of delinquent boys felt seriously handicapped by their encounter with the police or juvenile court. They perceived no substantial change in interpersonal relationships with family, friends, or teachers. Their major fear was that a delinquency record would impair their ability to find a job, and would cause the police to keep a close watch over them.); Jensen, *Delinquency and Adolescent Self-Conceptions: A Study of the Personal Relevance of Infraction*, 20 SOC. PROBS. 84 (1972) (although there is a tendency for those officially labeled "delinquent" to view them-

tion process beyond the labeling influence of the legal proceedings and records themselves. Similarly, it is unclear that access to juvenile hearings would decrease the occupational and educational opportunities of the juvenile offender. The FBI, the military, government agencies and private employers currently may obtain information about an individual's juvenile court contacts.[112] Potential employers, moreover, probably do not screen old newspaper files to determine the criminal record of a youthful applicant. Absent personal recollection, the employer will only learn of a juvenile's record through official or quasi-official channels. Thus, public access to juvenile delinquency hearings may contribute minimally, if at all, to the juvenile's sense of alienation and loss of occupational and educational opportunities.

Publicity of juvenile court proceedings may also prove beneficial to both the juvenile and society. First, the public has an interest in learning the identity of the juvenile offender, just as with the criminal, in order to guard against further depredations.[113] Second, publicity of juvenile delinquency hearings may deter juvenile delinquency.[114] Such publicity may also alert the juvenile's parents,[115] as well as others, to their responsibilities toward their children.[116] In short, publicity surrounding juvenile delinquency hearings may not harm the juvenile, and may, in fact, benefit both the juvenile and society.

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selves as delinquent, this tendency is far from perfect, varying according to race, economic status, attachment to the law, and attachment to parents).

112. *See* note 48 *supra* and accompanying text. Also, employers and educational institutions desiring information about delinquency would probably seek out police and court records rather than isolated newspaper reports. *See* Comment, *supra* note 36, at 157-58. There is also some evidence that newspapers possessing the right to print the names of juvenile offenders do so only very occasionally. *See* Conway, *supra* note 56, at 22.

113. *See* F. HAIMAN, *supra* note 26, at 373; Geis, *Publication of the Names of Juvenile Felons*, 23 MONT. L. REV. 141, 152 (1962) ("A major reason advanced for the publication of the names of offending delinquents is that such publication puts the community on guard against further depredations by the youths."). Geis himself finds this approach "both shortsighted and illusory," for "the best protection to the community is not the immediate identification of the juvenile malefactor so that he can be shunned, but the reform of the offender so that he can be trusted." *Id.* at 152-53.

114. *See* Geis, *supra* note 113, at 153-54. There is, however, little empirical support for this assertion. *Id.* at 157. Geis explores the argument that publicizing juvenile offenders' names will deter other youths from committing delinquent acts. This deterrence springs from the youths' fear that their own names will end up in the newspaper, causing them to lose the respect and emotional support of people who are important to them. *Id.* at 154.

115. Open juvenile delinquency proceedings, however, may excessively punish juveniles and their parents. Public exposure could so embarrass the members of the juvenile's family that they withhold their support in rehabilitative efforts. *See In re* J.S., 140 Vt. 458, 468, 438 A.2d 1125, 1129 (1981).

116. *See* Comment, *supra* note 36, at 162.

B. *Constitutional Restrictions on Access to Juvenile Court Proceedings*

Recognition of a first amendment right to attend juvenile delinquency hearings would not open all hearings to all people. As with criminal trials, the right to attend juvenile delinquency hearings may yield to "an overriding interest articulated in findings,"[117] and is subject to reasonable time, place and manner restrictions. This standard, set out in *Richmond Newspapers* and *Globe Newspaper*, forbids the mandatory or routine closure of juvenile hearings. Because "the exclusionary provisions [of mandatory closure statutes] are triggered without any finding of necessity, any examination of alternatives, or any limitations on the closure order to exclude only those persons at only those times as is necessary to fulfill policies underlying the statute,"[118] such provisions are overbroad and unconstitutionally restrict first amendment rights.[119] Similarly, statutes that permit routine closure of juvenile trials, without the deliberate and careful weighing of interests envisioned by *Richmond Newspapers*, cannot survive a first amendment challenge. Thus, the juvenile court judge must determine on a case-by-case basis whether the presence of courtroom observers would interfere with the administration of justice.[120]

1. *Potentially Compelling State Interests*

Two potential state interests might justify restricting access to juvenile court proceedings. First, when courtroom observers pose the risk of disrupting the orderly administration of justice, the juvenile court judge may impose reasonable limitations on access to ensure "the fair administration of justice . . . [and] a quiet and orderly setting" for trial.[121] If the number of observers is inconsistent with a quiet and orderly setting, or if the presence of the media would amount to an undue intrusion into the juvenile hearings,[122] the judge

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117. *Richmond Newspapers*, 448 U.S. at 581 (plurality opinion).

118. Note, *Evaluating Court Closures After* Richmond Newspapers: *Using Sixth Amendment Standards to Enforce a First Amendment Right*, 50 GEO. WASH. L. REV. 304, 322 (1982) (footnote omitted).

119. *See* notes 15-18 *supra* and accompanying text.

120. *Cf. Globe Newspaper*, 102 S. Ct. at 2621:

> [A]s compelling as [the state's interest in safeguarding the physical and psychological well-being of a minor witness] is, it does not justify a *mandatory*-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity, and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

(Emphasis in original) (footnotes omitted).

121. *Richmond Newspapers*, 448 U.S. at 581 n.18 (plurality opinion).

122. Recognition of the right of the press and public to attend delinquency hearings would not necessarily result in more intrusive forms of access, such as television coverage of the hearings. While this Note advocates recognition of a constitutional right of access to delin-

may impose reasonable restrictions on access to the juvenile courtroom. Thus, a right of access need not interfere with the functions of the juvenile court.[123]

Second, the court may restrict access to the courtroom upon articulating an overriding interest in closure. As required by *Richmond Newspapers* and *Globe Newspaper*, these findings must relate to the particular circumstances of the case at issue. For example, a judge may close a delinquency hearing upon a showing that the particular juvenile before the court would be unduly inhibited by the presence of courtroom observers, thus precluding free and open communication with the judge.[124] Similarly, if the judge finds public identification would seriously harm the particular offender, he may exclude the public from the hearing.[125] Absent such a finding, the first amendment requires that the juvenile courtroom remain open to the public.

2. *Narrowly Tailoring Restrictions on Access*

The Supreme Court has held that absent a particular, articulated compelling state interest to the contrary, courts cannot exclude the public from criminal trials.[126] Even in the presence of such an interest, the restriction imposed must be narrowly tailored to minimize its restriction of first amendment rights.[127] When a juvenile court judge

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quency hearings, there is no *constitutional* right to televise trials. *See* Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235, 285 (1982). Thus, states would not be forced to allow television coverage in the absence of overriding contradictory state interests. However, the Supreme Court has held that states may *choose* to televise the criminal trials of adults, absent a showing by the defendant that electronic coverage would compromise his right to a fair trial. *See* Chandler v. Florida, 449 U.S. 560 (1981). In the context of delinquency hearings, the Court could find that television is so inimical to the intimacy and confidentiality interests of the juvenile court that it constitutes a per se violation of juveniles' due process rights. Alternatively, the Court could permit states to televise delinquency hearings absent a showing of prejudice by the juvenile. The implications of the latter approach are unclear, as it is difficult to predict how many states would choose to televise their delinquency hearings.

123. *See* note 77 *supra*.

124. The juvenile court judge would conduct an inquiry into the facts and circumstances of a case to determine whether courtroom closure is necessary.

> [R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion. This does not mean, however, that for purposes of this inquiry the court cannot protect the minor . . . by denying these representatives the opportunity to confront or cross-examine the [minor], or by denying them access to sensitive details concerning the [minor] . . . .

Globe Newspaper, 102 S. Ct. at 2622 n.25 (citation omitted). The judge would then balance the need for closure in an individual case against the presumptive right of public access to the hearing, and articulate his decision in written findings.

125. *See* note 124 *supra*.

126. *See* notes 9-18 *supra* and accompanying text.

127. The proscription against overbreadth in legislation affecting first amendment rights is well established. The Court sometimes rejects legislation as overbroad because the means employed by the state are not sufficiently related to the interests it sought to implement, or because the state interest itself failed to justify restrictions on expression. *See* NAACP v.

does articulate a legitimately compelling interest in restricting access, what procedure satisfies such an interest with the least damage to the public right of access? The two basic alternatives are denying access itself, or conditioning access on the future conduct of those admitted. The former approach offers less information to the public, while the latter invites serious conflict with the law of prior restraints, the very foundation of first amendment doctrine.

a. *Denial of access*. A court can limit the first amendment costs of denying access in two ways. First, if a judge closes a hearing, the closure order should extend only to that portion of the hearing in which the state's interest justifies overriding the first amendment right of access.[128] Second, the court should make available transcripts of the closed proceedings, with whatever excisions the particular compelling interest dictates in that case.[129]

This approach does not completely satisfy the first amendment interest in public access. The checking value concept follows from a distrust of what the government chooses to reveal about itself; an edited after-the-fact account provided by the court itself does little to strengthen public scrutiny of its operations. Nor does a transcript

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Alabama, 377 U.S. 288, 307-08 (1964); NAACP v. Button, 371 U.S. 415, 432-44 (1963); Israel, Elfbrandt v. Russell: *The Demise of the Oath?*, 1966 SUP. CT. REV. 193, 217-18. In other cases,

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted). Moreover, "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981). The Court recognizes that "[a]pplication of the overbreadth doctrine in this manner is, manifestly, strong medicine." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). However, "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn . . . ." 413 U.S. at 611. *See generally* Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

128. Newman v. Graddick, 9 MEDIA L. REP. (BNA) 1104, 1108 (11th Cir. 1983) ("[i]f closure is warranted, the restriction on access must be narrowly drawn with only that part of the proceeding as is necessary closed"); *see* notes 121-24 *supra* and accompanying text.

129. *See Globe Newspaper*, 102 S. Ct. at 2625 (Burger, C.J., dissenting) (transcript availability minimizes the effect on the first amendment interest); Gannett Co. v. DePasquale, 443 U.S. 368, 400 (1979) (Powell, J., concurring) ("because exclusion is justified only as a protection of the defendant's right to a fair trial and the State's interest in confidentiality, members of the press and public objecting to the exclusion have the right to demand that it extend no farther than is likely to achieve these goals. Thus, for example, the trial court should not withhold the transcript of closed courtroom proceedings past the time when no prejudice is likely to result to the defendant or the State from its release."); Poughkeepsie Newspapers v. Rosenblatt, 9 MED. L. REP. (BNA) 1362, 1363 (N.Y. App. Div. 1983) (per curiam) ("where closure is required, its duration should be as limited as circumstances allow with a view toward causing the minimum possible impact upon the public's right to be informed").

capture with complete effectiveness the full reality of the proceeding, the atmosphere of the courtroom or the demeanor of the witnesses. As Justice Brennan observed in *Richmond Newspapers*, a "transcript is no substitute for a public presence at the trial itself."[130] Similarly, the *Globe Newspaper* Court favored the right of access over the rape victim's privacy notwithstanding the contemporaneous availability of transcripts.[131] Thus, while the provision of transcripts minimizes the first amendment interest sacrificed by closure, and therefore is constitutionally required by the need to "narrowly tailor" any access restriction,[132] alternatives arguably more consistent with the right of access deserve consideration.

b. *Conditional access*. One possible resolution of the conflict between state interests in confidential juvenile delinquency hearings and the first amendment right of access to criminal trials is conditional access: individuals could be admitted to the courtroom on the condition that they not divulge or publicize the proceeding's most sensitive aspect (*e.g.*, the offender's identity).[133] This approach would ensure the public's presence in the courtroom without surrendering the state's compelling interest in nondisclosure. But this approach involves forbidding reporters from publishing what they have legally learned, implicating the first amendment's profound antipathy to prior restraints.[134]

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130. *Richmond Newspapers*, 448 U.S. at 597 n.22 (Brennan, J., concurring). *But cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 376-77 & n.4 (1979) (jurisdiction not defeated, although case perhaps "technically moot," when press given transcript of pretrial supression hearing after defendants pled guilty to lesser included offenses); 443 U.S. at 393 (after transcript was furnished, the "press and the public then had a full opportunity to scrutinize the suppression hearing. . . . Under these circumstances, and First and Fourteenth Amendment right . . . to attend a criminal trial was not violated.").

131. The majority in *Globe Newspaper* deemed the closure statute unconstitutional, implicitly rejecting the dissent's argument that transcript availability negated the first amendment interest in access to the proceeding itself. *See* note 129 *supra*.

132. Of course, the transcript can be edited to the extent minimally sufficient to protect the compelling state interest. *See* Poughkeepsie Newspapers v. Rosenblatt, 9 MEDIA L. REP. (BNA) 1362, 1364 (N.Y. App. Div. 1983) (per curiam) ("Consistent with the view that any interference with the freedom of the press and the public's right to know should be held to the absolute minimum necessary to protect a defendant's right to a fair trial, a transcript of the hearing, *redacted so as to exclude matters pertaining to evidence which the respondent Justice has ruled to be inadmissible at trial*, should immediately be made available to the press.") (emphasis added).

133. *See In re* B.P., 9 MEDIA L. REP. (BNA) 1151 (Fla. Cir. Ct. 1983) (admitting media representatives on condition that no facial picture of juvenile be taken or broadcast, on pain of contempt).

134. *See* note 100 *supra*. *But see* Brian W. v. Superior Court, 20 Cal. 3d 618, 623 n.6, 574 P.2d 788, 791 n.6, 143 Cal. Rptr. 717, 720 n.6 (1977) (conditional access distinguished from prior restraint by limitation of the restraining order to information denied from the closed hearing itself; constitutionality of conditional access therefore an open question). *Cf. Globe Newspaper*, 102 S. Ct. at 2623 n.1 (Burger, C.J., dissenting) ("It is clear that the victims would 'waive' the exclusion of the press only if the trial court gave them guarantees of strict privacy, guarantees . . . which themselves would raise grave constitutional problems.") (citing Ne-

Several considerations, however, distinguish conditional access from prior restraints. First, conditional access does not prohibit the press from publishing information per se; rather, publication of an offender's name would be forbidden only if the press obtained the information from the courtroom.[135] A regime of conditional access could therefore still preserve the constitutionally crucial distinction between access regulation (the negative retention of information) from censorship (the affirmative suppression of information).

The distinction appears more clearly upon an examination of the effects of conditional access and prior restraint. Classic prior restraints diminish the flow of information to the public.[136] In stark contrast, conditional access *maximizes* the flow of information to the

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braska Press Assn. v. Stuart, 427 U.S. 539 (1976), and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).

On the constitutional repugnance of prior restraints, see New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

135. This difference distinguishes conditional access from the prior restraint struck down in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam). In *Smith*, the state statute required court approval prior to publication of a juvenile offender's name. The reporters "obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney who were at the school" after the shooting took place. 443 U.S. at 99. In *Oklahoma Publishing*, the juvenile's name was learned at an open detention hearing, and widely publicized prior to a gag order issued at a subsequent closed arraignment hearing. The order purported to apply to subsequent republication of an identity obtained independently of the closed proceeding. 430 U.S. at 309. *See also Globe Newspaper*, 102 S. Ct. at 2628 & n.1 (Stevens, J., dissenting) ("the right of access is plainly not coextensive with the right of expression that was vindicated in [Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)]; [f]or example, even though a reporter may have no right of access to a judge's side-bar conference, it surely does not follow that the judge could enjoin publication of what a reporter might have learned about such a conference."); *Gannett*, 443 U.S. at 399 (Powell, J., concurring) (courtroom closures that deny the press access to only one source are distinguishable from "classic prior restraint(s)" such as gag orders which tell the press what it may or may not publish); Brian W. v. Superior Court, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1977):

> In both [*Oklahoma Publishing* and *Cox Broadcasting*] the court significantly emphasized that it was confronted with public business, a public event, or official records open to public inspection. Though prior restraints on publication always demand a heavy burden of justification (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 556-561, 96 S.Ct. 2791, 49 L.Ed.2d 683), the absolute ban on such restraints in *Oklahoma Publishing* and *Cox* applies only to information already in the public domain. The holdings in these cases, then, do not necessarily extend to juvenile court hearings that are not open to the public, but which media representatives are conditionally permitted to attend.

20 Cal. 3d at 624 n.6, 574 P.2d at 791 n.6, 143 Cal. Rptr. at 720 n.6. Professor Tribe has argued that prohibiting publication of information "about this trial" is a broad restriction on the press that can be distinguished from prohibiting publication of a specific trial document or closing the courtroom. He labels the current Supreme Court approach to access — allowing courtroom closures but prohibiting almost any restrictions on dissemination of information already in the hands of the press — a "foolish rule." In his view, closing the courtroom is indistinguishable from prohibiting publication of information obtained from the court. Tribe, Richmond Newspapers: *A Panel Discussion*, in 2 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980, 184-87 (1981). Doctrinally, such a distinction is justified by the journalist's consent to the conditions imposed, and the net increment in public information fostered by conditional access.

136. *See, e.g.*, Pittsburgh Press v. Pittsburgh Commn. on Human Relations, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed,

public. The conditionally admitted observer remains "free to describe the details of the offense and inform the community of the proceedings against the juvenile."[137] Rigid application of the prior restraint doctrine to conditional access yields the anomalous result of restricting the flow of information to the public.

Finally, an innovative procedural approach to conditional access might overcome the doctrinal problem altogether. In *Snepp v. United States*,[138] the Supreme Court interpreted a contract between the Central Intelligence Agency and one of its agents, providing for prepublication review by the Agency of any material the agent might later prepare for the public relating to his service with the Agency, as imposing a constructive trust on the revenues derived from a book published in violation of the contract. The trust was deemed for the interest of the government, and the revenue from Snepp's book reverted to the CIA. In reaching this result, the Court dismissed Snepp's first amendment arguments in a footnote.[139] Given the government's compelling interest in the security of intelligence activities, "[t]he agreement that Snepp signed is a reasonable means for protecting this vital interest."[140]

The Court left unclear the force of a nondisclosure contract absent a compelling interest in secrecy. But since the right of access declared in *Richmond Newspapers* and *Globe Newspaper* permits access restrictions only when the government demonstrates such an interest, a contractual approach to access regulation appears to be sanctioned by *Snepp*. The damage problems that persuaded the *Snepp* Court to impose a constructive trust may present some obstacles to such an approach.[141] But an appropriately drafted provision for liquidated damages could overcome this difficulty.[142] Individuals admitted to a juvenile court proceeding, pursuant to a contract with the court not to disseminate particular information disclosed at the hearing, would then become liable for a fixed sum of damages

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either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

137. Smith v. Daily Mail Publishing Co., 443 U.S. at 108 (Rehnquist, J., concurring).

138. 444 U.S. 507 (1980) (per curiam).

139. *See* 444 U.S. at 509 n.3.

140. 444 U.S. at 509 n.3.

141. The Court was concerned that the dangers of unreviewed disclosure were genuine but unquantifiable, and might require proof of the very facts the government desired to keep secret. *See* 444 U.S. at 514-16.

142. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981); *id.*, § 356, Comment b ("The greater the difficulty either of proving that loss had occurred or of establishing its amount . . . the easier it is to show that the amount fixed is reasonable."). The parties in *Snepp* did not contractually provide for liquidated damages. The requirement of a compelling state interest before *any* access restriction becomes constitutional under *Globe Newspaper* and *Richmond Newspapers* should dispel any apprehension that such a contractual approach will become so widely used as to threaten, rather than foster, the free flow of information.

upon proof of a breach of the contract. Conditional access would then amount to no more of a "prior restraint" than the contract the Court enforced in *Snepp*.

Conclusion

The first amendment right to attend criminal trials should extend to juvenile delinquency hearings. Public access to these hearings would fulfill the first amendment's structural role of ensuring a free flow of information necessary to effective self-government, and of checking the abuse of official power. Although the state has a legitimate interest in the confidentiality of juvenile court proceedings, this interest does not justify the mandatory or routine closure of juvenile delinquency hearings. The judge may, however, impose reasonable restriction on access to the juvenile courtroom upon a showing that an "overriding interest articulated in findings" justifies an infringement of first amendment rights. Conditional access offers the restriction on first amendment rights most narrowly tailored to the protection of such a compelling interest. Courts wary of the doctrinal challenges posed by such an approach should, at a minimum, close only the portion of the proceeding implicating the overriding interest, and make available contemporaneous transcripts of any closed proceedings.